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No. 557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE KROGER GROCERY & BAKING COMPANY, WESCO FOODS COMPANY, THE COLTER COMPANY, PAY'N TAKIT, INC., CHARLES M. ROBERTSON, JOSEPH BAPPERT, FRANK L. REOCK AND JOSEPH B. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION

FRANK E. WOOD,
ROBERT S. MARX,
THOMAS M. LILLARD,
Attorneys for Petitioners.

NICHOLS, WOOD, MARX & GINTER,
LILLARD, EIDSON, LEWIS & PORTER,
Of Counsel.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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To The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners and each of them above named respectfully pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered August 26, 1944 (R. 124-5), reversing a judgment entered by the district court on demurrer before trial (R. 40-1), holding fatally defective and dismiss-

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Italics supplied unless otherwise noted.

ing the indictment in two counts purporting to charge petitioners with violations of Sections 1 and 2 of the Sherman Act (Title 15, U. S. C., Sections 1 and 2) because the indictment does not meet the requirements of Article 3, Section 2, Paragraph 3, and of the Fifth and Sixth Amendments of the Constitution.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 26, 1944 (R. 124-5). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U.S.C., Sec. 347).

OPINIONS OF THE COURTS BELOW

The opinion of the district court is reported in 51 Fed. Supp. 448 and in the Record (pp. 33-53). The original opinion of the Court of Appeals rendered January 17, 1944, to which Judge Vaught dissented, is not reported but is printed as an appendix to the petition for writ of certiorari, filed by Safeway Stores, Inc., at pp. 29-53 thereof, (No. ——— October Term, 1944). The opinion of the Court of Appeals on rehearing rendered August 26, 1944, and the dissenting opinion of Judge Phillips to which he appended the dissent of Judge Vaught to the first decision are not yet reported but are printed in the Record in the order stated. (Majority opinion, R. 89-107, dissent of Judge Phillips, R. 107-110; dissent Judge Vaught, R. 111-124.) The opinion of the Court of Appeals, rendered August 26, 1944, covers case No. 2807, involving a separate indictment against Safeway Stores, Inc., Maryland, et al., returned in the same court as the Kroger indictment (case No. 2808) and substantially similar thereto. However, the

opinion also deals with eight other cases, Nos. 2792 to 2799, inclusive, involving indictments brought in the District Court of Colorado, respecting an alleged conspiracy in that state having as its objective retail sale prices of alcoholic beverages in Colorado which were determined to concern intrastate commerce and which are wholly disassociated from the grocery indictments against Kroger and Safeway.

THE STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act as amended (Title 15, U.S.C., Secs. 1 and 2, 26 Stat. 209).

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioners were indicted in the District of Kansas on two counts (R. 1-24). The first count alleged a conspiracy by The Kroger Grocery & Baking Company, three subsidiaries and five individuals as officers of the Kroger company, and others unknown, to restrain interstate trade in "food and food products" (R. 16) somewhere in the United States, sometime during the twenty-six years preceding the return of the indictment (R. 2). The second count alleged in similar language that the conspiracy was "to monopolize a substantial part of the aforesaid interstate trade and commerce" (R. 19). Jurisdiction and venue in Kansas are asserted by charging that the conspiracy was carried out "in part" within the District of Kansas and that the petitioners performed in Kansas "many" of the acts set forth in Paragraph 20, and also since September 1, 1939, advertised "food and food products in Kansas City and elsewhere in the State of Kansas, below cost and below the price charged by them for similar products in other locations" (R. 19). The petitioners filed a joint demurrer to the indictment (R. 25).

The district court sustained the demurrer and dismissed the indictment (R. 26) on the grounds set forth in the well reasoned opinion of the respected and late Judge Hopkins, reported in 51 Fed. Supp. 448 and in the Record (pp. 33-53). The Government appealed to the Circuit Court of Appeals for the Tenth Circuit where it was first heard by Circuit Judges Bratton and Phillips and District Judge Vaught. Judge Bratton wrote the majority opinion reversing the District Court. Judge Phillips concurred; Judge Vaught dissented. A rehearing was granted (R. 88). The second hearing was held April 24, 1944, before Circuit Judges Phillips, Bratton, Huxman and Murrah (R. 88). On rehearing Judge Phillips, who concurred with Judge Bratton in the majority opinion on the first hearing, was convinced that the indictment was bad. Judges Huxman and Murrah concurred with Judge Bratton in holding the indictment good. Judge Phillips then wrote a dissenting opinion and appended thereto the dissenting opinion of Judge Vaught (R. 107-110).

QUESTIONS PRESENTED

The questions presented by this petition are very simple and very important, namely,

First: Is the constitutional guarantee that "in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation" met by an indictment for conspiracy under the anti-trust laws, which charges the offense in the very words of the statute and states no "time" except sometime during the last twenty-six years and no "place" except some place within the United States, and no subject matter except "food and food products" and although alleging "*terms*" alleges no "circumstances" of said conspiracy?

Second: Assuming that (as the courts below held) the indictment does not state "acts and intent with reasonable particularity of time, place and circumstances"* so as to inform the accused of the nature and cause of the accusation, is the indictment defective and demurrable or *may it be remedied by a "bill of particulars" and the constitutional guarantee made dependent on the discretion of the trial court and information supplied by the district attorney instead of by the grand jury?*

Third: May jurisdiction and venue be laid in a district hundreds of miles from the residence of the individual defendants and from the headquarters and domicile of the corporate defendant without alleging with reasonable particularity as to time, place and circumstance, a single overt act committed in said distant district as part of said conspiracy or that any of said individual defendants have ever been in said district?

REASONS RELIED UPON FOR GRANTING THE WRIT

First: Because the Court of Appeals decided an important question of federal law involving the civil and constitutional rights of individual defendants and the constitutional rights of the corporate defendants and the decision is in conflict with the decisions of this court in the following cases:

United States v. *Simmons*, 96 U. S. 360, 362
United States v. *Hess*, 124 U. S. 483, 487
Evans v. *United States*, 153 U. S. 584, 587
Hagner v. *United States*, 285 U. S. 427, 431
Glasser v. *United States*, 315 U. S. 60, 66

The Sixth Amendment to the Federal Constitution provides: "In all criminal prosecutions the accused shall en-

* *United States* v. *Cruikshank*, 92 U. S. 542, 557.

joy the right . . . to be informed of the nature and cause of the accusation."

The Fifth Amendment provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy."

In the landmark case of *United States* v. *Cruikshank*, 92 U. S. 542, Chief Justice Waite stated at page 558 that the indictment must ". . . furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. *A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.*" These requirements have never been departed from—until now. It has continuously been held that "every ingredient of which the offense is composed must be accurately and clearly alleged *in the indictment.*" *

The holding of the Court of Appeals that the indictment in the case at bar (analyzed in our brief) can be "remedied" by a bill of particulars makes a mockery of these constitutional requirements. Stripped of surplus language and conclusions, the indictment simply charges that the Kroger Company entered into a conspiracy with itself and its officers to restrain and monopolize interstate trade in "food and food products" sometime in the twenty-six year period from 1917 to 1943 somewhere in the United States. The time is nowhere stated. The place is nowhere stated. The subject matter is stated simply as food and food products, which includes food for humans, poultry and livestock. The period involved covers the business life of the defendants. The area covers America. The subjects are

* *United States* v. *Cook*, 84 U. S. 168, 174.

unnamed and could consist of many thousands of items. The defendants are not furnished with any information from which it is possible to prepare a defense. They cannot prepare to defend themselves as to every act over this vast period of time and over this vast area with respect to this vast number of subjects. Nor does the indictment purport to cover all the time or all the area or all the subjects. The defendants are left completely in the dark as to what time, what area and what subjects are involved in the alleged conspiracy. As Judge Phillips said at bar: "The indictment places on defendants a burden beyond human comprehension."

This Court recently said in *Glasser* v. *United States*, 315 U. S. 60, in discussing the Sixth Amendment:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where scales of justice may be delicately poised between guilt and innocence." (p. 67)
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> * * * * * *
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> "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power." (p. 69)
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> * * * * * *
>
> "This (right to assistance of counsel) is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty." (p. 69)

and that this right is

> "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (p. 76)

Second: Because the constitutional guarantee that the accused shall enjoy the right to be informed of the nature and cause of the accusation against him with reasonable particularity as to time, place and circumstance does not rest in the *discretion* of the trial judge in granting or denying a motion for a bill of particulars, or on information

supplied by the district attorney, not found by the grand jury. The guarantees of civil rights contained in the Sixth Amendment are absolute and mandatory, and we contend that the failure to comply with constitutional provisions cannot be "remedied" at the unreviewable *discretion* of the trial judge.

It is apparent that the majority opinions of the court below construe the indictment as defective (1) in failing to specify or describe "the kind or kinds of food and food products" (R. 101); (2) in alleging a conspiracy to acquire the business of independent retail grocers and local chains throughout the United States, "without naming or giving the location of the grocers and chains" (R. 101); (3) in charging that the defendant selected local areas to injure competition of independent grocers, meat dealers and local food chains, "without specifying the areas or naming the grocers, meat dealers or food chains" (R. 101). (4) The majority further held that the indictment contained further vague and general charges "not necessary to detail, *with similar omissions*" (R. 101), and then said "but these indictments each charge in *general terms* a conspiracy to restrain interstate trade and commerce, or to monopolize such trade and commerce, as the case may be, *substantially in the language of the Act.* And if the allegations in respect to the manner and means of effecting the object of the combination and conspiracy are not set forth in sufficient detail, *the remedy is to apply for a bill of particulars*" (R. 101).

It has frequently been held that a bill of particulars addresses itself to the sound discretion of the court, "and its action thereon is not subject to review." * The information furnished in response to the granting of a motion for a bill of particulars again rests, to a large extent, with the district attorney. Thus, the alleged "*remedy*" makes it

* *Dunlop* v. *United States*, 165 U. S. 486, 491.

unnecessary for the grand jury in returning an indictment to comply with the constitutional requirements of the Bill of Rights, and denies the accused one of the safeguards which this Court said was "deemed necessary to insure fundamental human rights of life and liberty," a right "too fundamental to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The majority applied language applicable to a conspiracy charge under Section 37 of the Criminal Code to an indictment for conspiracy under the anti-trust laws, overlooking the fact that in an anti-trust case, the conspiracy itself is the crime which must be stated with reasonable particularity as to time, place and circumstance.

Judge Phillips points out in his dissent:

> "At the oral argument, counsel for the government admitted it did not rely upon an express agreement or conspiracy but upon *acts* and *circumstances* from which a conspiracy may be implied. In neither indictment is the time, place, and circumstances of the alleged long-continued conspiracies set forth with particularity . . . I agree that it is not necessary to plead, with particularity, the time, place and circumstances of the manner and means of effecting the *objects* of the conspiracy.* But it does seem to me that the time, place and circumstances of the *unlawful agreement* should be pleaded with particularity. Paragraph 23 of the indictment in No. 2807, and Paragraph 20 of the indictment in No. 2808, do plead the *terms* of the alleged unlawful agreements. But neither alleges them with any particularity as to *time, place* or *circumstance*, leaving the government free to prove acts and conduct from which it will ask the jury to infer the unlawful agreement, in No. 2807, limited only with respect to time to a period in excess of twenty-three years, and with respect to place, within twenty states of the

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* *Glasser* v. *United States*, 315, U. S. 60, 66.

> Union and in the District of Columbia, and in No. 2808, limited only with respect to time to a period in excess of twenty-six years and with respect to place, within nineteen states of the Union."

Judge Vaught met this vital question of civil rights in his dissent as follows:

> "Certain matters, as to details, might be called for or requested by a bill of particulars, but the *indictment* must always be definite and clear as to the ingredients of the offense. If these are not set out with sufficient clarity to inform the defendant what he is required to meet, it is a defective indictment. If the ingredients of the offense are not contained within the four corners of that document, nothing that might be supplied by the prosecutor by way of a bill of particulars can suffice. It was not even contended in the Glasser case that the indictment was not specific as to the elements constituting the conspiracy. . . . Where allegations in the indictment are not definite in stating the alleged conspiracy, the place, time and manner in which the unlawful agreement was reached, which constitute the conspiracy, then the indictment is so defective that it cannot be cured by a bill of particulars."

The decision of the majority, that the defects in this indictment arising from its failure to meet constitutional requirements, can be "*remedied*" at the *discretion* of the trial court in passing upon a bill of particulars, is in conflict with the decision of other circuit courts of appeal in the following cases:

> *Fontana* v. *United States*, 262 Fed. 283 (C.C.A. 8)
> *Collins* v. *United States*, 253 Fed. 609 (C.C.A. 9)
> *Lynch* v. *United States*, 10 F. (2d) 947 (C.C.A. 8)
> *Jarl* v. *United States*, 19 F. (2d) 891 (C.C.A. 8)
> *Corcoran* v. *United States*, 19 F. (2d) 901 (C.C.A. 8)
> *Foster* v. *United States*, 253 Fed. 481 (C.C.A. 9)
> *Partson* v. *United States*, 20 F. (2d) 127 (C.C.A. 8)

Turk v. *United States*, 20 F. (2d) 129 (C.C.A. 8)
Anderson v. *United States*, 260 Fed. 557 (C.C.A. 8)
Floren v. *United States*, 186 Fed. 961 (C.C.A. 8)
Knauer v. *United States*, 237 Fed. 8 (C.C.A. 8)

Third: Because the question of whether individual defendants may be indicted and tried in a jurisdiction in which they have never been, located many hundreds of miles from their places of residence, upon vague and general conclusions is of transcendent importance.

A similar question arises with respect to the corporate defendants, whose headquarters and domiciles, and whose managerial activities are conducted in Ohio, many hundreds of miles from the district where the indictment was returned. It should be noted that the *advertising* of food products either below cost or below the price charged somewhere else in the United States which is the vague conclusion upon which venue is alleged is not even named in the indictment as one of the "*terms*" of the alleged conspiracy. The indictment will be searched in vain for any particulars as to any time, place or circumstance of forming or carrying out any conspiracy in Kansas (or elsewhere). While the venue paragraph alleges that defendants performed "many" of the "acts" set forth in Paragraph 20, said paragraph 20 sets forth no "*acts*" of any kind, but describes in broad generalities the alleged "substantial terms" of the alleged unlawful agreement. *Terms* are not *acts*, and not a single act is anywhere particularized in the indictment.

Both the letter and the spirit of the constitutional requirement contained in Article III, Section 2, Paragraph 3, that "the trial of all crimes shall be held in the state where said crimes shall have been committed," and of the Bill of Rights, that the accused shall be tried "by an impartial jury of the state and district wherein the crime shall have been committed," are flagrantly violated by this attempt to try

in Kansas a company and its individual officers for a conspiracy which they could not have formulated or entered into in that district because they have never been there and because it is alleged that the policies of the corporations involved were determined by its managerial officers at its headquarters in Ohio. Nor does the indictment allege a single overt act pursuant to the conspiracy, within the state of Kansas. The indictment substitutes for the failure to particularize as to any acts, a mere conclusion as to "many acts" having been done. Conclusions are not admitted by demurrer.

This question squarely presents the issue as to whether citizens are to be tried hundreds of miles from their homes, and corporations hundreds of miles from their headquarters, books and records, on general conclusions, without being given any information as to the time, place or circumstances of a single act having been performed in the jurisdiction in which the indictment was returned. The question is fundamental to the liberty of American citizens. It is not technical, but so practical that the practice followed in this case operates to deny the accused a fair opportunity to defend.

CONCLUSION

The importance of the above three questions relating to the administration of criminal justice is such that this court should grant certiorari.

United States v. *Johnson*, 319 U. S. 503
Bowles v. *United States*, 319 U. S. 33
Roberts v. *United States*, 320 U. S. 264
McNabb v. *United States*, 318 U. S. 332
Anderson v. *United States*, 318 U. S. 350
Labor Board v. *I. & M. Electric Co.*, 318 U. S. 9
Jerome v. *United States*, 318 U. S. 101

For the foregoing reasons we earnestly submit and pray that a writ of certiorari be granted and that this court review and settle the questions herein presented.

Respectfully submitted,

FRANK E. WOOD,
ROBERT S. MARX,
THOMAS M. LILLARD,
Attorneys for Petitioners.

NICHOLS, WOOD, MARX & GINTER,
LILLARD, EIDSON, LEWIS & PORTER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Specifications of Error

1. The Circuit Court of Appeals erred in reversing the decision of the district court.

2. The Circuit Court of Appeals erred in not holding that the failure of the indictment to inform the petitioners of the accusation against them with reasonable particularity as to time, place and circumstance violated the provisions of the Fifth and Sixth Amendments to the Constitution of the United States.

3. The Circuit Court of Appeals erred in holding that the omission from the indictment of these constitutional requirements can be "remedied" by an application to the district court for a bill of particulars.

4. The Circuit Court of Appeals erred in not holding that the attempt to assert jurisdiction and venue in the District of Kansas denied to the petitioners their right under Article 3, Section 2, Paragraph 3, and under Amendment Sixth of the Constitution to be tried only "in the state and district wherein the crime shall have been committed."

Analysis of Indictment

In the petition for certiorari, we assert that the indictment contains no information which will enable the defendants to prepare a defense. In the event of trial and judgment thereunder, defendants would be unable to plead an acquittal or conviction in bar of any other proceeding against them, based on the same matters for which they were acquitted or convicted in this indictment, because no specific time, place or subject matter are described. In view of the *length* of the indictment, the court may at first blush think the statement that defendants are merely charged with an unlawful conspiracy under the anti-trust laws, in the very words of the statute, without particularization as to time, place and circumstance, is an overstatement of the case. Careful analysis of the indictment demonstrates that we have correctly stated the case, and that the prolixity of language used in drafting the indictment is either descriptive of the grocery business or of the defendants' history, and has nothing to do with the gist of the charge. Most of the indictment is either surplusage or the pleading of general conclusions without any particularization as to the time, place or circumstances involved.

Count One of the indictment charges restraint of trade. Count Two, monopoly. Otherwise the two counts are substantially the same. Hence this analysis, confined to Count One, applies equally to Count Two.

The indictment begins in Section I by stating that it refers to an unknown time beginning on or about January 1, 1917 and continuing to date. This covers a period preceding our entry into World War I and stretches through the administrations of Presidents Wilson, Harding, Coolidge, Hoover and Roosevelt. Who can come into a courtroom prepared to defend every act over practically his entire life?

Section II is devoted to dictionary definitions of words, but food is nowhere described, except that it includes food for humans and "for livestock and poultry."

Section III names the defendants, tells who they are and where they live. All of the individual defendants live in Cincinnati, Ohio. The corporate defendants are incorporated in Ohio, have their principal place of business in Cincinnati, Ohio, where, the indictment says, "their principal officers remain and where their principal records are kept." It also alleges that the individual defendants control all the business, policies and practices of the corporate defendants from Cincinnati, Ohio.

Section IV sets forth voluminously a general description of portions of the grocery business and some census figures, showing that in 1939, 387,337 grocery stores had sales of $7,721,753,000, which represented only *70%* of the sales in stores in the United States, and that Kroger sales for the same period were only $243,356,605 and the number of Kroger stores was approximately 3,422 (a fraction of 1% of the total sales and number of stores). The same section describes the acquisition of stores by the Kroger Company beginning in 1902 and continuing to 1939. It also describes the Kroger organization, its divisions and some of the numerous products manufactured, processed, canned, packed, bought, jobbed and sold by Kroger. This description has nothing to do with the alleged combination and conspiracy, and covers fifteen paragraphs and nine pages (R. 6 to 15).

The charging part of Count One is contained in Section V, paragraph 19, which charges, *in the language of the statute*, that for "many years" prior to the indictment, "defendants formed a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce in food and food products produced, distributed and sold in many states of

the United States, in violation of Section I of the Act of Congress of July 2, 1890."

The above quoted paragraph tells the defendants nothing more than the language of the Sherman Act.

Paragraph 20 then sets forth what are called "substantial *terms*" of the conspiracy. It cannot be contended that these "terms" inform defendants of any alleged "acts" so that they can properly defend themselves. The indictment's "terms" are five in number, denominated "A," "B," "C," "D" and "E." "A" is rather simple, "B" has two subdivisions, "C" has three subdivisions, "D" has seven subdivisions, "E" has two subdivisions. The reading of these "terms" leaves layman and lawyer alike bewildered and perplexed. It is difficult to simplify this language so as to make common sense of it.

For example, it is alleged in term "A" that defendants, as part of the conspiracy, acquired "other stores." There is nothing in the indictment stating what stores were so acquired, where they were located, or the date of acquisition. If Kroger had only acquired a few stores, it might be possible to defend against a charge that the acquisition of stores was part of a conspiracy to restrain trade. But the indictment, in paragraph 10, sets out that Kroger, in forty-nine transactions over a period not from 1917, but from 1904 to 1939, acquired 2,317 stores. The indictment does not allege that a single one of these acquisitions was part of the alleged conspiracy, nor does it allege that all of these store acquisitions were part of an alleged conspiracy. Therefore, defendants must come to trial wholly unprepared on term "A." They cannot be expected to come to trial with all the documents and all the witnesses to defend themselves as to each of 2,317 stores acquired during a *thirty-five year period of time.* Many of the men who negotiated these acquisitions are dead. The papers and documents are not in existence.

This so-called "term" is a mere conclusion and like the others, was drawn to confound and confuse the defendants in their defense.

Obviously, if it is alleged that the acquisition of *all* stores was a part of the conspiracy, that fact should be alleged. If only a *part* of these acquisitions is the subject of complaint, then the indictment should specify which transactions are covered. The Grand Jury must have known. There is no excuse for not naming any transaction.

Term "B" is that defendants "selected *local areas* in which to injure *competitors*, by selling lower than *elsewhere*" and combining with other big chains. No local areas are described. The commodities sold lower are not identified. The place where sold is unnamed. The competitor injured is not named. Nor are the defendants advised with what unnamed chain and during what unnamed time within the period of the last twenty-five years they are alleged to have combined. How can a criminal charge be more vague and general and more calculated to conceal from the defendants what specific charge they must prepare to meet when brought to the bar of the court for trial? Since Kroger has thirty-one hundred local stores scattered in nineteen states, the local areas referred to may relate to any one of the thirty-one hundred local areas in which it does business. Kroger sells thousands of different commodities. It has literally hundreds of thousands of small and large competitors. Many economic factors must be taken into consideration in fixing prices. Of necessity, prices vary greatly in different store locations. No one would expect oranges to sell in Kansas at the same price at which they are sold near California or Florida. When the indictment charges defendants with selling unnamed articles in unnamed areas lower than "elsewhere," at sometime during the last twenty-five years, we are hopelessly confused, instead of being "informed" of the nature of the accusation.

Term "C" simply alleges it was among the "terms" that defendants prevent competition in *selected* areas *throughout* the United States by combining with independent grocers, of whom there are hundreds of thousands, local and national chains and manufacturers of food and food products, of which there are approximately 25,000, and *others* to fix and maintain resale prices in one or more of these selected areas and "by making agreements, dividing and apportioning trade territory in *such* areas."

Term "D" of paragraph 20 alleges that it was one of the "terms" that defendants obtain buying preferences over unnamed competitors by controlling the terms and conditions upon which unidentified manufacturers, processors, packers and *other* suppliers of food and food products sell to the defendants and to other competitors, and that this was to be accomplished by various devious methods described in broad generalities.

Term "E" is a vicious generality. It alleges some false comparisons of "prices" with "competitors," "short changing" and "short weighing" some place, somewhere. What "prices"? What "competitors"? What "sales"? When? Where? In view of the millions of sales, thousands of items in thousands of stores, over a quarter of a century, how could a defendant ever prepare to defend himself against such charges without definite information as to when, where or with whom such transactions took place?

The above analysis covers the only paragraphs of the indictment which purport to describe the charge, and Paragraphs 19, 20 and 21 will be searched in vain for any information with respect to any definite time, place or circumstance which will enable defendants to prepare their defense or to which they can intelligently plead.

The indictment at bar is unique. To charge defendants, in the words of the statute, with restraint of "food and

food products," is no different than to charge General Motors with restraint of trade in "machinery products" without stating whether the charge refers to automobiles, frigidaires, diesel engines or any one of the many articles of machinery which it manufactures. It is similar to an indictment against Armour or American Tobacco Company charging a restraint of "farm products" without further particulars. Words like "machinery," "minerals," "farm products," or "food and food products" are like "trade and commerce," so all inclusive as to be uninformative. Acquiescence by the courts in the use of such generalities would establish a dangerous precedent. Such indictments do not satisfy the constitution, do not descend to particulars but enable the prosecution to conceal from the defendants, until the last minute of the trial, the definite and specific acts with which they are charged.

THE FUNDAMENTAL ERROR OF THE MAJORITY OPINION

As we read the opinions below the court was *unanimous* in concluding that the indictments of Kroger and Safeway were defective in *omitting* to state any time, place or circumstance or any act or combination with respect to any identifiable subject and that defendants could not prepare to defend themselves against such general charges *without further information.* However, the judges differed as to the *remedy* for such defective indictment. The majority held that the omission of any particulars in the indictment returned by the grand jury could be "*remedied*" by "*a bill of particulars,*" and that the information omitted by the grand jury might be furnished by the district attorney and thereby save the indictment. The minority and the district judge held that the constitutional requirements of the Sixth Amendment were among the funda-

mental bulwarks of life and liberty in the United States and could not be made dependent upon the *discretion* of either the district judge in acting on a motion for further particulars or the district attorney in supplying particulars. Individual defendants who face possible jail sentences should not be denied an opportunity to defend themselves and their liberty, and should not be made dependent on discretionary bills of particulars furnished by district attorneys. Where human liberty is placed in jeopardy by *grand jury indictment* they are entitled to know what the *grand jury* found—not what the prosecuting attorney chooses to tell them. The dissenting judges were of the opinion that the remedy for the failure of an indictment to meet constitutional requirements was a motion to quash or a demurrer which would safeguard the civil rights of the accused and enable a proper indictment to be returned.

Thus, the issue was between three judges (Bratton, Murrah and Huxman) who held that the *remedy* was to *ask* for a bill of particulars, and three judges (Phillips, Vaught and Hopkins) who held that a *constitutionally defective* indictment should be quashed.

We submit that the majority erred and that the error resulted from a misconception and a misapplication of the language of this court in *Glasser* v. *United States,* 315 U. S. 60. The majority failed to keep in mind the distinction between a "conspiracy" under Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) and the different kind of conspiracy contemplated in the Sherman Act and hence misapplied decisions in Section 37 cases as being interchangeably applicable to anti-trust cases.

Section 37 forbids a conspiracy to commit "an offense against the United States." The mere *formation* of the conspiracy does not constitute the crime because, by the language of the Act, a necessary element is that one of the conspirators "*do*" an "*act to effect the object of the*

conspiracy." Unless an "act to effect the object," called the "overt act," is committed there is no punishable crime under Section 37.

The conspiracy contemplated in the Sherman Act is entirely different. It aims not "at an offense against the United States" but specifically relates to a conspiracy in restraint of interstate trade. An anti-trust conspiracy is a completed crime when the contract or combination is formed or entered into without regard to whether or not an overt act is committed. Hence, an overt act is essential to a conspiracy under Section 37 but is not essential under the Sherman Act except to establish jurisdiction when venue is laid at a point remote from the jurisdiction in which the conspiracy was formulated.

Under Section 37 it is necessary that the primary crime, to-wit, the conspiracy, be entered into, and *secondarily,* that there be an overt act, sometimes referred to as the *ways and means* by which the conspiracy is carried out. It has uniformly been held in Section 37 cases that the *primary crime, to-wit, the conspiracy,* must be set forth with reasonable particularity as to time, place and circumstance but that the ways and means by which the conspiracy was carried out may be amplified by a bill of particulars. The omissions in the indictment of Kroger do not concern "ways and means." In the Kroger indictment there is a complete absence of any particulars as to the time, place and circumstances of the conspiracy—which is the crime.

The confusion of the majority is evident from the opening sentence of the original opinion of Judge Bratton, which states:

> "These are two criminal prosecutions for combining and conspiring to *commit offenses against the United States* in violation of Sections 1 and 2 of the Sherman Act."

The same thought is subsequently repeated. The majority based their decision on *Glasser* v. *United States*, 315 U. S. 60, which was a *conspiracy indictment under Sec. 37*. Because of the *Glasser* opinion Judge Bratton erroneously said that it was necessary to overrule the prior decisions of the Tenth Circuit Court of Appeals in the *Skelley* * and *White* * cases as being out of harmony with the *Glasser* case. The *Glasser* case is similar to the *Williamson*,* *Thornton* * and *Wong Tai* * cases. In all the above cases the secondary or objective act was "to commit an offense against the United States." This offense in the *Glasser* case was to "*defraud the United States.*" This court said in the *Glasser* case at page 66:

> "The indictment is sufficiently definite to inform petitioners of the charges against them. It shows "certainty, to a common intent." *Williamson* v. *United States*, 207 U. S. 425, 447. The particularity of time, place, circumstances, causes, etc., *in stating the manner and means* of effecting the *object of a conspiracy*, for which petitioners contend, *is not essential to an indictment.*"

The above quotation was interpreted by the majority as requiring the court to *overrule* the decisions of that court in the *Skelley* and *White* cases and render a decision in the case at bar in conflict with a number of decisions in other circuit courts of appeal. We submit that this court did not intend to say in the *Glasser* case that the constitutional requirement of "time, place and circumstance" in an indictment charging a conspiracy is no longer necessary. *No such revolutionary proposition was before this Court for decision.* Examination of the *Glasser* indictment shows that the first count charged a definite *place, to-wit, Chicago,* at a *definite time, to-wit, March 15, 1935.* Glasser, an

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* *Skelley* v. *United States*, 37 Fed. (2d) 503; *White* v. *United States*, 67 Fed. (2d) 71; *Williamson* v. *United States*, 207 U. S. 425; *Thornton* v. *United States*, 271 U. S. 414; *Wong Tai* v. *United States*, 273 U. S. 77.

assistant United States district attorney, conspired with *definitely named persons,* to-wit, Kretske, Kaplan, Roth and Horton, to defraud the United States out of the honest services of its prosecuting officials. The "manner and means" of accomplishing the conspiracy is set forth in some detail in paragraphs 15 to 39 which names *fifty overt acts.* Glasser's contention was that "this part" of the indictment was too vague and it was with reference to "this part" of the indictment that this Court spoke in discussing the extent to which vagueness could be clarified by a bill of particulars.

It would indeed be revolutionary if this Court should uphold the erroneous opinion below and say now that time, place and circumstance are no longer essential in an anti-trust indictment. Such a holding would not only overrule a long line of anti-trust cases but also a long line of settled authorities in the courts of appeals holding that failure to particularize as to time, place and circumstance of the conspiracy which is the primary crime, *cannot be remedied by a bill of particulars.* For example, in *Jarl* v. *United States,* 19 Fed. (2d) 891, it was contended that indefiniteness should have been cured by a motion for a bill of particulars. The court said (p. 894):

> "It cannot be used to cure an indictment fatally defective. Furthermore, we do not know on what reason, or by what authority a District Attorney can assume to specify the particular offense the grand jury intends to charge, nor do we believe that any statement he might make in that respect would be binding as of record on a plea of former jeopardy. He has no power of control or right to change the action of that body."

The courts of appeals' decisions with which the present decision is in conflict, include *Fontana* v. *U. S.,* 262 Fed. 283; *Lynch* v. *U. S.,* 10 Fed. (2d) 947; *Corcoran* v. *U. S.,* 19 Fed. (2d) 901; *Partson* v. *U. S.,* 20 Fed. (2d) 127; *Turk* v. *U. S.,*

20 Fed. (2d) 129; *White* v. *U. S.*, 67 Fed. (2d) 71; *Foster* v. *U. S.*, 253 Fed. Rep. 481; *U. S.* v. *Tubbs*, 94 Fed. 356.

In *Floren* v. *U. S.*, 186 Fed. 961 (C. C. A. 8), Judge Sanborn said at page 964:

> "Where an indictment is so fatally defective in its statement of the facts alleged to constitute the offense charged that a conviction or acquittal upon it constitutes no defense to another prosecution for the same offense, a bill of particulars cannot cure it."

In *United States* v. *Norris*, 281 U. S. 619, the facts were stipulated. This Court said:

> "If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found." (p. 622)

See also *Ex parte Bain*, 121 U. S. 1; *United States* v. *Comyns*, 248 U. S. 345; *Dunlop* v. *United States*, 165 U. S. 486.

United States v. New York Great Atlantic & Pacific Tea Co., 137 Fed. (2d) 459, Distinguished

The government in the court below relied heavily upon the denial by this Court of certiorari in the above case* and the majority cite the same as an important authority. We are admonished that the denial of certiorari by this Court is not to be taken as any expression of an opinion on the merits of the case or on questions of law which may or may not have been brought forward or considered. Aside from this fact, examination of the indictment against the N. Y. Great Atlantic & Pacific Tea Company indicates that the indictment in that case was not as devoid of any specification of time, place and circumstance as the Kroger and Safeway indictments, but contained certain definite allegations.

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* Certiorari denied 320 U. S. 783.

In Part 5, 23 C(10) of the A. & P. indictment it is charged that the defendants cornered the "principal supply of *coffee available* for importation into the United States during said *six months' period* and artificially increasing the prices of coffee in the United States."

In Part 5, 23 C(11)(c) of the A. & P. indictment meat and canned goods are specifically mentioned. In Paragraph 23A(2) of the A. & P. indictment the time of the alleged agreement is specified as being "during such price wars."

In laying venue and jurisdiction the A. & P. indictment specifically charges that *meat* was sold in *Dallas* below cost and below the price charged for the *same meat* in other locations for the purpose of destroying the competition of *independent meat dealers.*

The above examples taken from the indictment in the *A. & P.* case show that, while said indictment was far from a model of clarity and definiteness, it did contain specific and definite allegations with reference to time, place and subject matter in contrast to the indictments in the *Kroger* and *Safeway* cases which do not contain a single date, do not name one article of food, do not describe a single area and do not name one competitor or collaborator.

There Is No Justification for Returning the Indictment in Kansas

Venue in Kansas is based upon the fiction of "constructive" presence in a district where it is not claimed that any one of the individual defendants has ever set foot. The constitutional right to be tried only "in the state and district wherein the crime shall have been committed" loses all of its value unless its protection is afforded before the trial is held. We do not question the rule laid down

by this court,* that after conviction in a trial where it is proved that definite overt acts were committed within the district in carrying out a conspiracy, defendants could not challenge the venue of the crime in that district. However, where objection is made *before* trial the indictment must be examined to ascertain whether any *acts pursuant to the conspiracy* are set forth with reasonable particularity as to time, place and circumstance to justify trying defendants in a jurisdiction far remote from their residence. When we examine the allegations with reference to venue we find that the climax in generalities has been reached. We are merely told, without specification, that the conspiracy was carried out "in part" in Kansas and that defendants performed in Kansas "many" of the acts set forth in Paragraph 20. When we turn to Paragraph 20 we find it sets forth substantial "terms"—not acts. Which acts, of the unnamed and unknown "many," is not remotely suggested. The only statement is that defendants *advertised* "food and food products in Kansas City, Kansas, and elsewhere in the State of Kansas, below cost and below the price charged by them for *similar* products in *other* locations." It should be noted that *advertising* as alleged is not even one of the "substantial terms" of the conspiracy set forth in Paragraph 20. Thus the defendants are left completely in the dark as to the time, place and circumstance of any act in Kansas because no act pursuant to the conspiracy charged is alleged. Further we would expect meat for instance to be not only advertised but sold cheaper in Kansas City than New York or "elsewhere" and it is frequently necessary to advertise articles below cost to move them from the shelves.

We do not claim that the defendants have a constitutional right to be tried at their place of residence. We do

* *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *United States*, 225 U. S. 392; *United States* v. *Trenton Potteries Co.*, 273 U. S. 372; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150.

contend that if required to go to trial in Kansas upon *this* indictment their constitutional right to be tried in the district "where the crime shall have been committed" would be grossly abused and defendants will be subjected to an oppressive application of the rule which in certain cases permits basing venue upon overt acts in a foreign jurisdiction.

In *Hyde* v. *United States*, 225 U. S. 347, Justice McKenna foresaw the danger which lurks in vague and general pleadings and said:

> "We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused and we do not wish to put out of view such possibility." (p. 363)

Here jurisdiction is extended in a conspiracy case without even alleging one "overt act"!

A greater abuse than that which was foreseen has now occurred and we conclude our discussion by quoting the forceful language of Mr. Justice Holmes in his dissenting opinion in the *Hyde* case. He said at page 386:

> "Obviously the use of this fiction or form of words must not be pushed to such a point in the administration of the national law as to transgress the requirement of the Constitution that the trial of crimes shall be held in the State and district where the crimes shall have been committed. Art. 3, Sec. 2, cl. 3, Amendments, art. 6. With the country extending from ocean to ocean, this requirement is even more important now than it was a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grievous wrongs. In the case of conspiracy the danger is conspicuously brought out. Every overt act done in aid of it of course is attributed to the conspirators, and if that means that the conspiracy is present as such wherever any overt

act is done, it might be at the choice of the Government to prosecute in any one of twenty states in none of which the conspirators had been. And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even wider if success should be held not to merge the conspiracy in the crime intended and achieved. I think it unnecessary to dwell on oppressions that I believe have been practised or on the constitutional history impressively adduced by Mr. Worthington to show that this is one of the wrongs that our forefathers meant to prevent."

CONCLUSION

We respectfully submit that this Court should pass on the serious questions herein presented. These questions transcend private interest. They concern every individual and the stockholders of every company with an extended business life. If the indictment in the *Kroger* case be sustained then a way has been opened to prosecute individuals and companies engaged in business by charging them with a conspiracy in general language, covering every act of their business lives for more than a quarter of a century, without further specification, and trying them at the farthest possible point from their residence and the headquarters of their business, without any further particulars than the trial Judge in the District selected by the government may in his discretion ask the district attorney to furnish. Such procedure does not even pay feeble lip service to the provisions of our constitution which were intended to guarantee that the accused be fully and fairly informed of the time, place and circumstance of the crime charged so that he may have a full and fair opportunity to defend himself and which were also intended to guarantee that he would be tried where the crime was actually committed and not "constructively" at some jurisdiction far re-

moved from his residence, headquarters and place of business. As Judge Phillips said, these questions are not technical—not theoretical—they are intensely practical. They concern the liberty of individuals—as well as the property of corporate stockholders.

We believe they merit the consideration of the Court.

Respectfully submitted,

FRANK E. WOOD,
ROBERT S. MARX,
THOMAS M. LILLARD,
Attorneys for Petitioners.

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CITATIONS

615431—54

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 557

THE KROGER GROCERY & BAKING CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on demurrer to the indictment (R. 33–53) is reported in 51 F. Supp. 448. The opinion of January 17, 1944, of the Circuit Court of Appeals was ordered withdrawn (R. 125) and is not reported. The opinion of August 26, 1944 of the Circuit Court of Appeals (R. 89–124) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 26, 1944 (R. 124–125).

The petition for the writ of certiorari was filed October 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the allegations of the indictment are too vague and indefinite to apprise the defendants of the nature of the offenses charged.

2. Whether the allegations of the indictment sufficiently show the jurisdiction or venue of the district court.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693 (15 U. S. C. 1, 2), provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

> or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

STATEMENT

This case involves the validity of an indictment containing two counts. The first count (R. 2–19) charges a conspiracy to restrain interstate commerce in food and food products, produced, distributed and sold in many states of the United States, and the second count (R. 19–24) charges a conspiracy to monopolize a substantial part of such commerce, in violation of Sections 1 and 2, respectively, of the Sherman Act. Named as defendants were The Kroger Grocery & Baking Company, three corporate subsidiaries, and five individuals alleged to be officers, agents or employees of one or more of the corporate defendants (R. 4–5, 11).

Count one of the indictment alleges the following facts among others: Petitioners are the third largest manufacturers, processors, wholesalers, and retail distributors of food and food products in the United States (R. 11). In addition to numerous manufacturing and processing plants (R. 11–13), they own and operate twenty-five wholesale warehouses and 3,422 retail food stores (R. 10–11). These warehouses and stores are located in the states of Arkansas, Georgia, Illinois, Iowa, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Missouri, North Carolina,

Ohio, Oklahoma, Tennessee, Virginia, West Virginia, Pennsylvania, Kansas and Wisconsin (R. 10–11). Petitioners also purchase from other producers, canners, and manufacturers large quantities of food and food products (R. 13–14). They distribute food and food products not only to their own outlets but also sell to other food distributors (R. 11, 13–14).

The food and food products which petitioners manufacture or purchase in the various states are shipped to warehouses in other states and are distributed from these points to their retail stores (R. 14). These stores, as well as petitioners' wholesale warehouses, are divided into four geographical divisions (R. 10–11). Officers, agents, and employees of the headquarters of each of these four divisions are responsible for all wholesale and retail operations within the division's geographical limits (R. 10). Petitioners' retail stores requisition the commodities which they need from petitioners' warehouses and the latter invoice commodities so requisitioned at retail prices, except that fresh meat is invoiced at wholesale prices subject to the requirement that it be sold at the mark-up specified by the warehouses (R. 14). Warehouse officials exercise jurisdiction over all books and accounts of petitioners' retail stores, make frequent inventories of store stocks, and check cash receipts (R. 14–15).

By virtue of the horizontal and vertical integration of petitioners' function and business, they

have and exercise the power to dominate and control the production, prices, and distribution of a substantial part of the food and food products produced, marketed, and consumed in the United States (R. 15).

Count One charges the petitioners with having been engaged continuously since on or about January 1, 1917 to the day of the return of the indictment in a conspiracy in unreasonable restraint of interstate commerce in food and food products, and that this conspiracy consisted in a continuing agreement and concert of action to do the following (R. 2, 15–16):

(a) To acquire throughout the United States, by merger and otherwise, the businesses of independent retail grocers and local chains (R. 16);

(b) To use their dominant position to injure and destroy, in selected areas throughout the United States, the competition of independent grocers, meat dealers, and small local food chains by selling in these areas at lower prices than elsewhere and by entering into agreements with other national food chains operating in such areas to follow petitioners' prices (R. 16);

(c) To prevent competition in selected trade areas throughout the United States by combining with independent grocers and local and national food chains to fix retail prices, by combining with food manufacturers to fix and maintain resale prices, and by dividing and apportioning the trade territories in such areas (R. 16–17);

(d) To obtain discriminatory buying preference over competitors by controlling, by numerous described methods, the terms and conditions upon which manufacturers and other suppliers of food and food products shall sell to petitioners and to their competitors (R. 20–22);

(e) To foster false comparisons of their prices with those charged by competitors, and false reports calculated to conceal their activities and to perpetuate their dominance and control of the distribution of food and food products (R. 18).

The indictment alleges that the conspiracy charged in Count One "has been entered into and carried out in part" within the district in which the indictment was returned, and that within the preceding three years petitioners have performed within that district many of the acts set forth as constituting a part of the conspiracy, and, in particular, petitioners have continuously since September 1, 1939, advertised food and food products below cost for the purpose and with the intent of injuring and destroying competition of independent concerns and local chain stores (R. 19).

Count Two reaffirms and incorporates all the factual allegations of count one (R. 19). It charges a conspiracy to monopolize a substantial part of interstate commerce in food and food products and that this conspiracy has consisted in a continuing agreement and concert of action to do certain things, which are set forth in the same

terms as those which are described as having been part and parcel of the conspiracy charged in count One (R. 20–22). The allegations in support of the jurisdiction of the district court are in the same words as the corresponding allegations of count One (R. 23).

The district court sustained petitioners' demurrer upon the grounds that each count of the indictment was too vague and indefinite, that each count was duplicitous, and that neither count contained an allegation of an illegal act by the defendants within the jurisdiction of the court (R. 34–35). On January 17, 1944, the Circuit Court of Appeals reversed the judgment of the district court (R. 57–58), with District Judge Vaught dissenting on the ground that the indictment lacked the requisite particularity (R. 58, 112–114). Petitioners applied for a rehearing (R. 61–87) which was granted (R. 88). The case was reargued before all of the judges of the Circuit Court of Appeals for the Tenth Circuit (R. 88–89, 124–125). The judgment of the district court was again reversed (R. 124–125), with Judge Phillips dissenting upon the single ground that the indictment was too vague and indefinite (R. 107–110).

ARGUMENT

The indictment in this case is substantially identical with that in *Safeway Stores, Inc.* v. *United States,* now pending on certiorari, No. 481; both

cases were decided by the court below in the same opinion.[1]

1. The contention as to the indefiniteness of the indictment is the same as that presented by the petition in No. 481, and the Court is respectfully referred to the Government's brief in opposition in that case for a discussion of the question.[2] In addition to arguing that the indictment is too general, petitioners attempt to create another issue. They contend that there is also presented the question of whether an indictment, lacking the particularity required by the Fifth and Sixth Amendments, is invulnerable to demurrer and subject only to a motion for a bill of particulars (Pet. 5, 6–11, 20–25). This contention is predicated upon the unfounded assertion that the court below believed the indictment defective but, misconstruing the opinion of this Court in *Glasser* v. *United States*, 315 U. S. 60, reversed the judgment of the district court on the ground that the remedy was to apply for a bill of particulars (*ibid.*). However, that part of the opinion dealing with the question of the definiteness of the in-

[1] The opinion covered also a third case, *Frankfort Distilleries* v. *United States*, which was decided against the United States on an entirely different ground, going to the merits, and which is now before this Court on the Government's petition for certiorari (Nos. 523–30, this Term).

[2] The brief in opposition in No. 481 (pp. 10–11) also argues that review should not be granted in the present posture of that case. This argument is equally applicable to the present petition.

dictment read in its entirety clearly reveals that the court believed the allegations sufficiently specific to fulfill constitutional requirements, and correctly citing the *Glasser* case,[3] stated that further details should be sought by a motion for a bill of particulars (R. 97–102).

2. Petitioners do not contend that the holding below with respect to the allegations of jurisdiction and venue is in conflict with any decision of this Court or of another circuit court of appeals. The question presented is simply whether the court below properly applied established principles. The court below followed and relied upon the decision in *United States* v. *New York Great Atlantic & Pacific Tea Company,* 137 F.

[3] Petitioners imply, in part by an ambiguous statement of facts not contained in the opinion, that the decision on this point in the *Glasser* case is confined to allegations of overt acts in indictments charging conspiracies under Section 37 of the Criminal Code (Pet. 22–24). An examination of the record and briefs in that case demonstrates that the implication is incorrect. Only count two, not count one, of the indictment in that case was before the Court. 315 U. S. at p. 63. It was contended in this Court that the allegations of the charging paragraph, either standing alone or amplified by the allegations in the paragraphs describing the "manner and means" by which the conspiracy was to be effected, were too vague and indefinite. It was not claimed that the allegations of the acts actually done "to effect the objects and purposes" of the conspiracy and which were set forth under the caption "Overt Acts" were defective. Record in Nos. 30–32, 1941 Term, 28–37; Brief for the Petitioner, Glasser, 27–30, Kretzke, 24–33, and Roth, 59–65.

(2d) 459 (C. C. A. 5) (R. 101–102). Both decisions apply the same principles to almost identical allegations[4] and arrive at the same conclusion. The question was raised in the petition for certiorari in that case, which was denied. 320 U. S. 783.[5] The application of these principles to the instant indictment is not of general importance.

The decision of the court below is clearly correct. There are positive allegations in each count that the conspiracy was "formed" and that it was "entered into" in part within the District of Kansas (R. 16, 19, 20, 23). A conspiracy under the Sherman Act is complete when it is formed and does not require either allegation or proof of an overt act in furtherance thereof, and the offense is committed and therefore may be tried in any district in which the conspiracy was formed as well as in any district where it has been carried out. *Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 402–403; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 252.

The indictment further explicitly alleges in each count that the conspiracy was "carried out" in part within the district of indictment (R. 16, 19, 20, 23). This is supplemented by the allega-

[4] Comparison of the two indictments demonstrates that petitioners' attempt to distinguish them (Pet. 25–26) is specious.

[5] See petition for certiorari in No. 397, 1943 Term, 8–9, 25–29.

tion that petitioners have performed in such district many of the acts the commission of which is charged as being a part of petitioners' conspiracy (R. 19, 23). Moreover, there is specification of particular overt acts performed within the district of indictment, namely advertising food and food products below cost for the purpose and with the intent of injuring and destroying the competition of independent concerns and local chain stores (R. 19, 23). If petitioners, in order adequately to prepare their defense, require further particulars, this is the function of a bill of particulars.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
HERBERT BORKLAND,
Special Assistant to the Attorney General.
OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE KROGER GROCERY & BAKING COMPANY ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The opposing brief (p. 2) attempts to avoid the constitutional questions presented by an obvious over-simplification of the issues. This is accomplished by ignoring in the restatement of the questions involved the omission of any allegation pertaining to time, place, circumstance or act, in an indictment which covers twenty-six years, the entire United States and all food for humans, livestock and poultry.

The "Questions" as set forth in the opposing brief would apply to every indictment, namely: Is it definite?

Does it allege jurisdiction? The true questions at bar go to an attempt to breach the bulwarks of human liberty and to make constitutional guarantees depend on discretionary Bills of Particulars. The real questions presented are well understood by the Government and are thus stated in the opposing brief (p. 8):

> "... there is also presented the question of whether an indictment, *lacking the particularity required by the Fifth and Sixth Amendments,* is invulnerable to demurrer and subject only to a motion for a bill of particulars." (Pet. 5, 6-11, 20-25.) (Italics ours.)

And in the opposing brief (p. 11) the Government proves that these are the questions by concluding:

> "If petitioners, *in order adequately to prepare their defense,* require further particulars, this is the function of a Bill of Particulars." (Italics ours.)

We contend that when the liberty of individual defendants is imperiled by indictment, the indictment must, under our Bill of Rights, contain at least enough information to enable such defendants "adequately to prepare their defense." Nor do these constitutional questions raise mere "issues of pleading" which may cause defendants "inconvenience" (opp. brief p. 10). This argument is answered by the words of this court in the *Glasser* case, quoted in the Petition (p. 71). If indictments of like scope in time, area and generality, are upheld, defendants will be put to a burden which Judge Phillips described as "beyond human comprehension." They must attend—hundreds of miles from their homes and their business—and remain through a trial which will obviously last for many months, at which trial they will learn for the first time the information without foreknowledge of which they cannot "adequately prepare their defense."

The opposing brief suggests that *only* at that "posture" of the case and *after* such protracted trial may this court consider whether defendants should have been tried at all or whether the trial should have been held in Kansas. We urge that the exceptional situation here presented and the vast scope of the indictment, necessitating a trial extending for months with the practical disruption of the third most important food business in America due to its management's absence more than a thousand miles from its office, demonstrates that review is required now!

Further, the fact that such lengthy trials in this and in other similar situations would, under the Government's contention, have to be *completed* before the questions at bar could be reviewed, shows the urgency and necessity of a review now for the guidance of the courts below, the District Attorney and Grand Juries considering similar indictments.

The fact that there are pending at the present time several indictments similarly defective, in which the Government claims that reliance should be had on a Bill of Particulars to supply constitutional defects in the indictments, further indicates that the questions are of general importance.

In the petition (pp. 25-26) we pointed out that the indictment in *United States* v. *New York Great Atlantic & Pacific Tea Company*, 137 F. (2d) 459 (C. C. A. 5), was *specific* as to certain *definite times—definite places*—and *definitely identified foods*. To say this fundamental difference between the *A. & P.* case and this case is "specious" (opp. brief, p. 10) is no answer.*

In the petition (pp. 22-24) we pointed out the error of the court below in misapplying the *Glasser* case. The oppos-

* The A. & P. indictment under IV, par. 14, covers specifically "coffee." Also par. 23, sub. par. c (10); V, par. 23c (7) and (8), cover entire crops of fresh fruits, vegetables and produce. Also par. 23c (9); V, par. 23a, sub. par. (2), covers price wars. Par. 23(b)(c) relates to brokerage; (f) to produce. VII, par. 26, relates to meat.

ing brief (p. 9) states that only Count Two, not Count One, of the indictment in that case was before the court. (315 U. S. 63.) This statement is correct but the fifty overt acts set out in Count One of the *Glasser* indictment (pp. 25-32, incl.) *are incorporated by reference into Count Two on page 56* of the indictment. Glasser did not contend that the indictment as a whole was indefinite—only that the "manner and means of effecting the object" of the conspiracy set forth in paragraphs 15 to 39 of the Glasser indictment were lacking in detail to inform him so he could prepare his defense. The language of this court with reference to a Bill of Particulars was *limited* to this contention.

The indictment in the present case as a whole is fatally defective for failure to identify any time, any place, any circumstance and any identifiable fact or act attributed to petitioners. For example, read the summary (pp. 5, 6) in the opposing brief. This summary is not of alleged "acts" but of alleged "terms" of the conspiracy. Read paragraphs "a" to "e" and ask as the alleged "terms" having to do with "competitors," "suppliers," "local areas," etc., are read—Where? When? Who? What? The answer is a *blank!* When we remember that there are *hundreds of thousands* of "independent retail grocers" of "competitors" of "local areas" of "retail" prices, of "suppliers" and of "food products," the *impossibility* of preparing a defense or in case of acquittal or conviction, pleading it in Bar is self-evident!

Finally, as to venue, the claim that this indictment fairly charges that the conspiracy was "formed" in Kansas is too tenuous to consider seriously. The defendants have never been in Kansas. The indictment does allege that the conspiracy was formed somewhere in the United States and concludes that it was "carried out in part" in Kansas. This conclusion standing alone can not support jurisdic-

tion for two reasons: first, to support jurisdiction in a district "outside the state and district wherein the crime shall have been committed," it must be alleged that some overt "act" was done pursuant to the criminal conspiracy in such District, and, second, in view of the period of *26 years* alleged as the period, it must further be alleged that such "overt" act was done within *three* years in order to come within the Statute of Limitations. To charge that "many" of the "acts" alleged in the indictment were done in Kansas, is to charge *nothing*, because no *"acts"* pursuant to the "conspiracy" are anywhere alleged in the indictment. For a description of the "acts"—many of which are alleged to have been done in Kansas—the Venue Section of the indictment (III) refers back to paragraph 26 of the indictment. When we examine paragraph 26 we find that it refers exclusively to the "terms" of the conspiracy and no "act" of any kind is alleged. Paragraph 29 particularizes (?) that Kroger *"advertised"* food products below cost, etc., but this charge as to advertising relates to something that is not even alleged as one of the terms of the conspiracy. In contradistinction, the indictment against The Great Atlantic & Pacific Tea Company alleged that advertisement and sale of *"meat"* below cost with intent to injure *"independent meat dealers"* in *Dallas, was an overt act in pursuance of the conspiracy.* The Kroger indictment merely generalizes as to unidentified "food and food products" being sold lower in Kansas than unidentified "similar" products were sold in unnamed "other locations." What "products"? What "other locations"? When? Where? No clue to the answer is contained in this indictment. Thus, an attempt is made to try defendants in the district and jurisdiction farthest removed from the *presumed* place (for none is alleged) where the conspiracy was formed (Cincinnati) without alleging a single overt act within the "terms" of the conspiracy, either in Kansas

or within the three year period of the Statute of Limitations.

We agree that the defendants may be tried in any district in which the conspiracy is formed, provided that the crime was committed within three years—but we deny that the indictment charges formation of the "conspiracy" in Kansas. We also agree that trial may be had in any district in which it was "carried out" but we deny that where a conspiracy between defendants was formed and the crime "completed" in *Cincinnati* defendants can be tried in *Kansas* without *"either allegation or proof of an overt act in furtherance thereof"* in Kansas as the opposing brief claims (p. 10).

The charge as to "advertising" is not only a departure from the conspiracy alleged but is so vague and indefinite that defendants cannot adequately prepare any defense thereto.

CONCLUSION

Two issues not heretofore determined by this Court are here squarely and timely presented.

1. Is an indictment which is constitutionally defective invulnerable to demurrer because the District Attorney can be required, if the Court in its discretion so orders, to supply information not found by the Grand Jury and without which defendants cannot adequately prepare their defense or avail themselves of the Constitutional immunity from double jeopardy?

2. Can defendants be tried in a district remote from the district and state where the conspiracy was formulated and the crime thus "completed" without alleging with required definiteness some overt act in said jurisdiction pursuant to the conspiracy within the statutory period of limitation?

These questions, we submit, are of paramount importance and of general concern. They should be answered before trial, not thereafter.

Respectfully submitted,

FRANK E. WOOD,
ROBERT S. MARX,
THOMAS M. LILLARD,
Attorneys for Petitioners.

NICHOLS, WOOD, MARX & GINTER,
LILLARD, EIDSON, LEWIS & PORTER,
Of Counsel.